

**EXHIBIT E**

**Proposed Form of Sale and Bid Procedures**

**Exhibit E – Sale and Bid Procedures**

## **SALE AND BID PROCEDURES**

Set forth below are the sale and bid procedures (the “Bidding Procedures”) that shall govern the sale of the Properties (defined below). Capitalized terms used but not otherwise defined herein shall have the meaning for such terms set forth in the Second Amended Chapter 11 Plan Filed by Creditor TH Holdco LLC (Docket No. \_\_\_\_).

**I. Assets to be Sold:** The assets to be sold consists of the Debtors’ and the Estates’ interests in the following properties (“Properties”) including, without limitation, the real property and any other assets integral to the operation of the Properties. The Properties are as follows: (i) 85 Flatbush Extension, Brooklyn, New York (Block 120; Lots 1201, 1202) (the “Hotel Property”), and (ii) 85 Flatbush Extension, Brooklyn, New York (Block 120; Lot 1203) (the “Residential Property”)<sup>1</sup>.

**II. Marketing Process and Due Diligence:** Jones Lang LaSalle or such other broker approved by the Bankruptcy Court which is reasonably acceptable to TH Holdco (“Broker”) will provide confidential information regarding the Properties to potential purchasers who request it as part of its ongoing marketing process. Any such potential purchaser who requests confidential information from Broker must execute a confidentiality agreement, in substantially the existing form being used by Broker. In addition, any Bids (defined below) must not contain any contingencies of any kind, including, among others, obtaining (i) financing; (ii) shareholder, board of directors or other approval; or (iii) the outcome or completion of due diligence. Each potential bidder must also affirmatively acknowledge that it (i) had an opportunity to conduct due diligence regarding the Properties prior to making its offer and does not require further due diligence, (ii) has relied solely upon its own independent review, investigation, and/or inspection of any documents and/or the Properties in making its bid, and (iii) did not rely upon any written or oral statements, representations, promises, warranties, or guaranties whatsoever, whether express, implied, by operation of law, or otherwise, regarding the Properties, or the completeness of any information provided in connection therewith except as expressly stated in these Bid Procedures.

**III. APA:** Broker will provide all bidders with a model form of APA (the “APA”), which TH Holdco, LLC (“TH Holdco”) has filed with the Bankruptcy Court as Docket No. \_\_\_\_ specifically for the sale of the Properties.

**IV. Auction:** The public auction sale (the “Public Auction Sale”) of the Properties shall be conducted by video conference on **June \_\_, 2022 at 11:00 a.m.**, upon the terms and conditions set forth herein (the “Public Auction Sale”) if Broker determines that any other Qualified Bids were timely submitted. The videoconference will be recorded or transcribed or both. By submitting a Qualified Bid, each Qualified Bidder consents to the recording of the Public Auction Sale. Only Qualified Bidders will be able to participate. Professionals and/or other representatives of Debtors and TH Holdco will be permitted to attend and observe the Public Auction Sale. The Public Auction Sale shall be an open auction where the material terms of the bids shall be disclosed to all bidders who attend the Public Auction Sale on the record.

---

<sup>1</sup> The New York City Department of Finance also utilizes the designation of Block 120, Lot 7503 for both the Hotel Property and the Residential Property.

The Public Auction Sale shall conclude when Broker or the auctioneer selected by Broker has determined that the bidding has closed after providing all bidders with a suitable opportunity to increase or further increase their bids. By participating in the Public Auction Sale, each bidder acknowledges its acceptance of these Bidding Procedures. The determination as to what is the highest and best bid shall ultimately be determined by the Bankruptcy Court after considering any submissions or statements by Broker, the Debtors, TH Holdco or any other party in interest.

**V. Bid Deadline:** All bids (“Bids”) must be served upon and actually received by Broker, on or before **June \_\_, 2022 at 4:00 p.m.** (the “Bid Deadline”). TH Holdco may extend the Bid Deadline for the delivery of Bids once or successively, without notice and for one or more bidders after consultation with the Debtors and Broker. Any party that does not submit a bid by the Bid Deadline will not be allowed to (i) submit any offer after the Bid Deadline or (ii) participate in the Public Auction Sale.

**VI. Qualified Bid Requirements:** Broker will determine (and, with respect to any Bid by an insider or affiliate of an insider or affiliate of the Debtors, consultation with TH Holdco), and subject to the Bidding Procedures and the requirements below, whether a Bid is a Qualified Bid and, ultimately a Successful Bid (as these terms are defined below). Any entity that desires to submit a Bid to purchase the Properties may do so in writing as follows:

(a) to be considered an offer for the purchase of the Properties must be a “Qualified Competing Bid” made by a Qualified Competing Bidder, as provided herein;

(b) a Qualified Competing Bid shall come from a party other than TH Holdco and consist of a timely and unconditional offer for the purchase of all of the Properties made by a Qualified Competing Bidder clearly setting forth the purchase price to be paid in Immediately Available Funds (as defined below), and be accompanied by a 10% deposit as provided for herein (the “Deposit”) in immediately available funds (as discussed below) and an executed copy of the APA to purchase the Properties, blacklined to show changes from the APA filed with the Bankruptcy Court, clearly setting forth any conditions for closing and stating that the Qualified Competing Bid is irrevocable as set forth below;

(c) a Qualified Competing Bid must identify the purchaser by its legal name (including any equity holders or other financial backers, if the potential purchaser is an entity formed for the purpose of submitting bids or consummating the sale), and any other party that will be participating in connection with the bid or the sale and include, at a minimum, the following information:

Proposed Price: The Bid must identify the price, in U.S. dollars that the Potential Bidder is submitting for the purchase of the Properties;

Unconditional Offer; No Financial Contingency. A statement that the Bid is formal, binding, and unconditional (except for those conditions expressly set forth in the applicable proposed APA), is not subject to any due diligence or financing contingency, and is irrevocable until the first business day following the closing of the proposed sale, except as otherwise provided in these Bid Procedures. To the extent that a Bid is not

accompanied by evidence of the Potential Bidder's capacity to consummate the sale set forth in its Bid with cash on hand (or other immediately available cash), each Bid must include committed financing documented to Broker's satisfaction, in consultation with TH Holdco and the Debtors, that demonstrates that the Potential Bidder has received sufficient debt and/or equity funding commitments to satisfy the Potential Bidder's purchase price and other obligations under its Bid.

Minimum Bid: Except as otherwise provided herein, each Bid submitted must exceed the TH Holdco Credit Bid and any Minimum Overbid Amount set forth herein.

Entire Property. Except as otherwise provided herein, each Bid submitted must be a Bid for the Properties.

Bids for either the Hotel Property or Residential Property. Bidders may also submit Bids for either the Hotel Property or Residential Property (each, a "**Partial Bid**"). Broker will determine, after consultation with TH Holdco and the Debtors, whether such Partial Bids qualify as Qualified Bids. Generally, to be considered a Qualified Bid, Broker, in consultation with the TH Holdco and the Debtors, must conclude that a Partial Bid, when taken together with other Partial Bids, satisfies the criteria for being a Qualified Bid.

A Partial Bid will not be considered to be a "Qualified Bid" unless Broker receives one or more Bids for the other Property, that, in combination with one or more other Bids for the other Property, constitutes a higher or better bid than a bid for the Properties.

No Entitlement to Expense Reimbursement or Other Amounts. A statement that the Bid does not entitle the Potential Bidder to any breakup fee, termination fee, expense reimbursement, or similar type of payment or reimbursement and a waiver of any substantial contribution administrative expense claim under section 503(b) of the Bankruptcy Code related to bidding for the Properties.

Adequate Assurance Information. Each Bid must contain such financial and other information that allows Broker to make a reasonable determination as to the Potential Bidder's financial and other capabilities to consummate the sale, including, without limitation, such financial and other information setting forth adequate assurance of future performance under section 365(f)(2)(B) of the Bankruptcy Code, and the Potential Bidder's willingness to perform under any contracts that proposed by such Potential Bidder to be assumed and assigned to the Potential Bidder.

Designation of Contracts and Leases. Each Bid must identify with particularity each and every executory contract and unexpired lease (if

any), the assumption and assignment of which they seek to acquire in the sale.

(d) a Qualified Competing Bid for the purchase of the Properties must be submitted by a party which Broker reasonably believes to be financially able to consummate the purchase of the Properties (a “Qualified Competing Bidder”);

(e) a Qualified Competing Bid must contain terms and conditions no less favorable to the Estates than those terms and conditions contained herein and in the APA;

(f) a Qualified Competing Bid must not be contingent upon either financing or the conduct or results of any due diligence investigation, the absence of any adverse change or approvals by any board, shareholders or other entity and must include the following representations and warranties:

- i. a statement that the Potential Bidder has had an opportunity to conduct any and all due diligence regarding the Debtors and the Properties prior to submitting its Bid;
- ii. a statement that the Potential Bidder has relied solely upon its own independent review, investigation, and/or inspection of any relevant documents in making its Bid and did not rely on any written or oral statements, representations, promises, warranties, or guaranties whatsoever, whether express or implied, by operation of law or otherwise, regarding the Debtors and the Properties or the completeness of any information provided in connection therewith, except as expressly stated in the representations and warranties contained in the Potential Bidder’s proposed APA ultimately accepted and executed by the Debtors;
- iii. a statement that the Potential Bidder agrees to serve as Back-Up Bidder (as defined herein), if its Bid is selected as the next highest or next best bid after the Successful Bid with respect to the Properties;
- iv. a statement that the Potential Bidder has not engaged in any collusion with respect to the submission of its Bid;
- v. a statement that all proof of financial ability to consummate a Sale in a timely manner and all information provided to support adequate assurance of future performance is true and correct; and
- vi. a statement that the Potential Bidder agrees to be bound by the terms of these Bid Procedures.

(g) a Qualified Competing Bid must provide for a closing date within a reasonable time after this Bankruptcy Court’s approval of this sale pursuant to the confirmation

order or a separate order of the Bankruptcy Court, which closing date may only be extended by further approval of the Bankruptcy Court;

(h) Deposits shall be made in “Immediately Available Funds” which shall be cashier’s check, certified check, wire transfer or cash;

(i) a Bid must include evidence of available cash, a commitment for financing (not subject to any conditions), and such other evidence of ability to consummate the transaction contemplated by the proposed APA, including financial statements (or such other form of financial disclosure and credit-quality support or enhancement reasonably acceptable to Broker (and, with respect to any Bid by an insider or affiliate of an insider of the Debtors, consultation with TH Holdco), sufficient to establish the financial wherewithal of the interested party to complete the contemplated transactions and, to the extent the interested party will rely upon the financial wherewithal of an affiliate, bid partner, or other sponsor (each, a “Sponsor”), evidence sufficient to establish the financial wherewithal and intent of the Sponsor to provide appropriate financial support.

(j) Each Qualified Competing Bid by an entity must contain evidence (e.g. a resolution) that it obtained all necessary organizational (not regulatory) approvals to make its competing bid and to enter into and perform pursuant to these Bid Procedures and the APA, including a copy of a board resolution or similar document demonstrating the authority of the bidder to make a binding and irrevocable bid on the terms proposed and to consummate the transaction contemplated by the proposed APA;

(k) a Bid must contain such and/or other information that will allow Broker (and, with respect to any Bid by an insider or affiliate of an insider of the Debtors, consultation with TH Holdco), to make a reasonable determination as to the bidder’s financial and other capabilities to consummate the transactions contemplated by the APA;

(l) a Bid must disclose the identity of the bidder’s organization, including confirmation that the bidder is acting as principal for the bidder’s account and, if not, the basis upon which the bidder is acting and the identities of all other participants (if any), and each of their pre-petition and post-petition relationships with other bidders, any of the Debtors’ major creditors and equity security holders of any of the foregoing (if any) and such additional information as Broker or the Bankruptcy Court may require regarding a bidder’s ability to satisfy the requirements of the transaction contemplated herein;

(m) a Bid must disclose any agreements or understandings between the bidder and any third party with respect to the Properties or with respect to any possible transaction involving the Debtors or insiders or affiliates of the Debtors; and

(n) if a Qualified Competing Bidder becomes the successful purchaser, its Deposit shall be increased to a total amount equal to 20% of the successful purchase price (the “New Deposit”) and the increase in amount between the Deposit and New Deposit must be deposited with Immediately Available Funds with the escrow agent approved by the Bankruptcy Court within 24 hours after the conclusion of the Public Auction Sale, and this New Deposit

shall be deemed to be nonrefundable and shall be forfeited if such purchaser fails to close in breach of its obligations under the APA as fully described below.

Notwithstanding anything to the contrary, the Successful Bidder's bid and the Backup Bidder's bid must remain irrevocable in accordance with the terms of the APA and the submission of a bid by the Bid Deadline shall constitute a binding and irrevocable offer to acquire the Properties reflected in such bid.

Notwithstanding anything to the contrary, TH Holdco is deemed to be a "Qualified Bidder" and a "Qualified Competing Bidder," and any credit bid by TH Holdco, which credit bid shall be in an amount up to and including the amount of the Allowed TH Holdco Secured Claim, is deemed to be a "Qualified Bid" and a "Qualified Competing Bid."

The Bankruptcy Court will have the right to determine that a bid is not a Qualified Bid if: (A) the terms of the bid are materially more burdensome or conditional than the terms of the APA and (B) are not offset by a material increase in purchase price, which determination may take into consideration: (1) whether the bid requires any indemnification of such Qualified Bidder; (2) whether the bid does not provide sufficient cash consideration; (3) whether the bid includes a non-cash instrument or similar consideration that is not freely marketable; or (4) any other factors the Bankruptcy Court may deem relevant.

If no Qualified Bid other than TH Holdco's credit bid is submitted by the Bid Deadline, the Auction shall not be held and the transaction with TH Holdco pursuant to the Confirmation Order may immediately close with no further order of this Bankruptcy Court.

**VII. Evaluation of Qualified Bids:** The sufficiency of any submitted Bid other than the bid of TH Holdco will be at the reasonable discretion of Broker, in consultation with TH Holdco and the Debtors. Broker shall as promptly as practicable, notify potential bidders who have (a) returned a signed confidentiality agreement, (b) timely submitted the information and documentation listed above and (c) who have financial qualifications satisfactory to Broker that they have been selected as a qualified bidder (each a "Qualified Bidder") and that their Bid is a "Qualified Bid." Between the date Broker notifies a Potential Bidder that it is a Qualified Bidder and the Public Auction Sale, Broker may discuss, negotiate or seek clarification of any Qualified Bid from a Qualified Bidder. Without the written consent of Broker, in consultation with the Debtors, a Qualified Bidder may not modify, amend or withdraw its Qualified Bid, except for proposed amendments to increase the purchase price or otherwise improve the terms of its Qualified Bid, as agreed to by the Debtors, during the period that such Qualified Bid remains binding as specified herein; provided that any Qualified Bid may be improved at the Public Auction Sale as set forth herein.

**VIII. The Auction:** The Public Auction Sale shall be conducted as set forth in Section IV. Only TH Holdco and any other Qualified Bidders may bid at the Public Auction Sale. If multiple Qualified Bids are received, any Qualified Bidder (or its duly authorized representative) shall have the right to continue to improve its Qualified Bid at the Public Auction Sale. All bids shall be made on the record before a court reporter in the presence of all other Qualified Bidders.

At the Public Auction Sale, Qualified Bidders will be permitted to increase their bids.



At the commencement of the Public Auction Sale, each Qualified Bidder shall be required to confirm that it has not engaged in any collusion with any other Qualified Bidder or Potential Bidder with respect to the bidding or the Sale. Each Qualified Bidder's participation in the sale and auction process both before and after the Public Auction Sale, is a confirmation that it (and any person or entity with an interest therein) has not engaged in any collusion with respect to the submission of any bid, the bidding, or the Public Auction Sale at any time, and it shall provide an affidavit to that effect at Broker's request.

**IX. Selection of Successful Bid or Bids:** At the conclusion of the Public Auction Sale, and subject to Bankruptcy Court approval, following the Public Auction Sale, the successful Bid or Bids shall be selected and announced by Broker (the "Successful Bid or Bids"), and the backup Bid or Bids shall be selected and announced by Broker (the "Backup Bid or Bids").

Within 48 hours of completion of the Public Auction Sale, the entity or entities that made the Successful Bid or Bids (the "Successful Bidder") and the entity or entities that made the Backup Bid or Bids shall complete and sign all agreements, contracts, instruments, and other documents evidencing and containing the terms and conditions upon which such Successful Bid or Bids and Backup Bid or Bids were made. Promptly following the submission of such documentation, the Debtors shall file with the Bankruptcy Court notice of the Successful Bid; the identity of the successful bidder; and, if applicable, the Backup Bid and the identity of the backup bidder. The Successful Bid or Backup Bid may not be assigned to any party without consent of Broker after consultation with TH Holdco and the Debtors.

**X. Backup Bids:** If the Successful Bidder fails to consummate the sale, breaches the APA, or otherwise fails to perform, the Estates may consummate the proposed sale with the Backup Bidder, which hereafter shall be included in the definition of "Successful Bidder," without the need for further Bankruptcy Court approval.

The Backup Bid shall remain open and irrevocable until the Closing of the Sale Transaction. The Backup Bidder's Deposit will be returned upon consummation of the Sale Transaction of the Properties to the Successful Bidder or will be otherwise applied or forfeited, as the case may be, if the Backup Bidder is determined to be the Successful Bidder.

**XI. Auction Confirmation Hearing:** All determinations of the Successful Bid or Bids and the Backup Bid or Bids shall be subject to and conditioned upon subsequent Bankruptcy Court approval if it relates to any bid other than the credit bid of TH Holdco confirmed by the Confirmation Order. After the Public Auction Sale and the selection of the Successful Bidder, a Hearing will be conducted by the Bankruptcy Court on or about **June \_\_, 2022 at 10:00 a.m.** to confirm the results of the Auction if necessary. No such Hearing shall be required if TH Holdco is the highest and best bidder unless requested by TH Holdco.

**XII. "As Is, Where Is":** The proposed transfer of any of the Properties will be on an "as is, where is" basis and without representations or warranties of any kind, nature, or description by the Debtors, their agents, or Estates or TH Holdco and its agents, except to the extent set forth in the applicable APA of each Successful Bidder as approved by the Bankruptcy Court. Except as otherwise provided in an APA, all of the Debtors' and Estates' right, title and

interest in the Properties will be transferred free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options and interests in accordance with sections 363(f), 365 and/or 1123 and 1129 of the Bankruptcy Code, which pledges, liens, security interests, encumbrances, claims, charges, options and interests will attach to the net proceeds of the sale with the same validity, priority, force and effect and subject to the same defenses as existed immediately before the sale.

**XIII. Return of Deposits:** If a Backup Bidder does not become the Successful Bidder, its Deposit shall be returned to it no later than five (5) business days after the closing of the sale. The Estates shall also be entitled to retain the Deposit from any other Bidders other than the Successful Bidder or the Backup Bidder, but only upon the express consent of such other Bidder and the Estates shall be required to return such Deposit no later than five (5) business days after the closing of the sale. The Estates shall be required to return the Deposit to any Bidder, who is not the Successful Bidder or a Backup Bidder, who does not agree to the retention of its Deposit no later than 48 hours after the conclusion of the Public Auction Sale and the bid of such potential bidder shall be deemed revoked and no longer enforceable.

The Deposit of a Qualified Bidder will be forfeited to the Estates if (i) the applicable Qualified Bidder attempts to modify, amend, terminate, or withdraw its Qualified Bid, except as permitted by these Bid Procedures, during the time the Qualified Bid remains binding and irrevocable under these Bid Procedures, or (ii) the Qualified Bidder is selected as the Successful Bidder and fails to enter into the required definitive documentation or to consummate the transaction according to these Bid Procedures and the terms of the applicable transaction documents with respect to the Successful Bid. The Escrow Agent shall release the Deposit by wire transfer of immediately available funds to an account designated by the Estates two (2) business days after the receipt by the Escrow Agent of a joint written notice by an authorized officer of the Debtors stating that the Qualified Bidder has breached or failed to satisfy its obligations or undertakings.

The Estates and, as applicable, the Potential Bidder, Qualified Bidder, Successful Bidder and/or Back-Up Bidder agree to execute an appropriate joint notice to the Escrow Agent for the return of any Deposit to the extent such return is required by these Bid Procedures. If either party fails to execute such written notice, the Deposit may be released by an order of the Bankruptcy Court.

**XIV. Revoked Bids:** At Broker's reasonable discretion, they may treat as waived and revoked any Qualified Competing Bid made by any Qualified Competing Bidder who does not attend the Public Auction Sale;

**XV. Actual Auction:** If one or more Qualified Competing Bids have been timely submitted, Broker shall conduct the Public Auction Sale among any Qualified Competing Bidders that have submitted a Qualified Competing Bid or Bids.

**XVI. Minimum Bid:** The minimum opening bid at the Public Auction Sale shall not be less than **\$93,000,000.00** (i.e. more than TH Holdco's existing credit bid plus its additional cash consideration under its filed Plan), and any subsequent bid shall comply with the Bid Increments set forth in Paragraph XVII below. All bids must provide for sufficient incremental funding so that holders of Allowed General Unsecured Claims in Classes 6 and 8 under the TH Holdco Plan will receive the same or greater treatment on account of their Allowed Claims.

**XVII. Bid Increments:** Subsequent bids, to be made on the record at the Public Auction Sale shall be in minimum increments of **\$500,000**, provided, however, that Broker reserves the right to and may waive such minimum incremental bid amount.

**XVIII. Close of Bidding:** At such time as it appears to Broker, in the exercise of its reasonable discretion, after consultation with the Debtors and TH Holdco, that none of the Qualified Competing Bidders present at the Public Auction Sale are prepared to advance the bidding, Broker shall (after giving fair warning, on the record, to those entities present) close the bidding on the record and the entity which immediately prior to the close of the bidding shall have submitted the highest and best offer for the purchase of the Properties shall be declared the Successful Bidder, subject to Bankruptcy Court Approval, and subject to entry by the Bankruptcy Court of a sale approval order or confirmation order approving such sale.

**XIX. Successful Bidder:** The Successful Bidder shall be bound by all of the terms of its APA (as such terms, including those with respect to the purchase price, shall have been modified by the terms of such purchaser's winning bid) and upon closing of such sale be granted the protections of sections 363(m) and (n) of the Bankruptcy Code. The deposit of the Successful Bidder shall be applied against the cash portion of the purchase price of such Successful Bidder upon the consummation of the transaction proposed in the Successful Bid.

**XX. Damages for Failure to Close:** If the Successful Bidder fails to consummate the sale in accordance with the terms of its Successful Bid and applicable APA: (a) the Estates will retain the Deposit of such bidder, to the extent provided by the APA, and (b) the Estates will maintain the right to pursue all available remedies against such bidder. If the Deposit is forfeited, such forfeiture shall not be deemed a liquidated damage provision and shall be deemed a measure of the Estates' actual damage.

**XXI. Consent to Jurisdiction and Authority as Condition to Bidding.** All Potential Bidders (including a Qualified Bidder, the Successful Bidder, and the Back-Up Bidder) shall be deemed to have (i) consented to the core jurisdiction of the Bankruptcy Court to enter any order or orders, which shall be binding in all respects, in any way related to the Bid Procedures, the Public Auction Sale, or the construction and enforcement of any agreement or any other document relating to the sale, (ii) waived any right to a jury trial in connection with any disputes relating to the Bid Procedures, the Public Auction Sale, or the construction and enforcement of any agreement or any other document relating to the Sale, and (iii) consented to the entry of a final order or judgment in any way related to the Bid Procedures, the Public Auction Sale, or the construction and enforcement of any agreement or any other document relating to the Sale if it is determined that the Bankruptcy Court would lack Article III jurisdiction to enter such a final order or judgment absent the consent of the parties.